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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO AMEZCUA MENDOZA,

Defendant and Appellant.

E069918

(Super.Ct.No. FWV07702)

OPINION

APPEAL from the Superior Court of San Bernardino County. George Genesta, Judge. (Retired judge of the Los Angeles Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Keli M. Reynolds for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Adrian R. Contreras, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to a plea agreement, defendant and appellant Francisco Amezcua Mendoza pled guilty to one count of possession of cocaine base for sale. (Health & Saf.

Code, former § 11351.5, count 1.) In return, a trial court placed him on three years' probation, under certain conditions. Defendant successfully completed probation, and the court permitted him to withdraw his guilty plea. A plea of not guilty was entered, and the case was dismissed, pursuant to Penal Code¹ former section 1203.4. Years later, defendant's application to renew his lawful permanent resident card was denied, and an immigration attorney told him he was deportable. He thereafter filed a motion to vacate his conviction, pursuant to Penal Code section 1473.7, which was denied without prejudice.

On appeal, defendant contends that the trial court erred in denying his motion to vacate his conviction pursuant to section 1473.7. We note that the People filed a request for judicial notice with regard to the legislative history of section 1473.7. We reserved ruling for consideration with the appeal and now grant the request. (Evid. Code, § 452, subd. (c).) We also affirm the judgment.

PROCEDURAL BACKGROUND

Defendant was charged by information with one count of possession of cocaine base for sale. (Health & Saf. Code, former § 11351.5, count 1.) On August 12, 1996, he entered a plea agreement and pled guilty. Pursuant to the agreement, the trial court placed him on probation for three years.

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

In 2000, the court permitted defendant to withdraw his guilty plea, after he successfully completed probation. A plea of not guilty was entered, and the case was dismissed, pursuant to former section 1203.4.

In 2007, defendant applied to renew his lawful permanent resident card (green card). The United States Department of Homeland Security (DHS) discovered that he had a police record that included two charges, including the one in the instant case. DHS requested him to submit court dispositions on both charges. Defendant failed to submit the requested documents and, therefore, his application was denied.

In February 2008, an immigration attorney informed defendant that he was deportable, due to his instant conviction.

In November 2008, defendant requested the court to reduce his charge to a misdemeanor. The court denied the request.

In June 2009, defendant filed a motion to vacate the judgment under section 1016.5, on the basis that he was not adequately advised of the immigration consequences of his conviction. The court denied the motion, noting that defendant had an interpreter, the court went over the plea form with defendant, and he initialed the box next to the paragraph on his plea form, which stated: "I understand that if I am not a citizen of the United States, deportation, exclusion from admission to the United States or denial of naturalization may result from a conviction of the offense(s) to which I plead guilty/nolo contendere." Furthermore, at the plea hearing, the prosecutor expressly advised defendant of the same. Thus, the court found that defendant clearly was advised there may be consequences as a result of his plea.

Defendant appealed the denial of the motion to vacate under section 1016.5. This court affirmed the judgment, concluding that defendant was given the required advisements on the plea form and in court, and the form was translated for him in Spanish. (*People v. Mendoza* (Sept. 8, 2010, E049354) [nonpub. opn.].)²

On August 25, 2017, defendant filed a motion to vacate his conviction pursuant to section 1473.7. He contended that his attorney rendered ineffective assistance of counsel (IAC) by failing to conduct an adequate investigation into the immigration consequences of his plea, misadvising him that a guilty plea would have no immigration consequences, and failing to seek alternative pleas that would avoid adverse immigration consequences. Defendant asserted that deportation is mandatory as a result of his conviction, while admitting he had not received a notice to appear in immigration court. He contended that he would have opted to go to trial, or he could have offered to serve time in county jail to avoid immigration consequences. In support of his motion, defendant submitted a declaration stating that he pled guilty without his attorney advising him that his conviction would result in his deportation. Defendant said his attorney asked him if he was legal, and he said he was because he had a green card; thereafter, his attorney told him that he should plead guilty, and that all he had to do was follow some rules for three years and he would not have any more problems. Defendant further stated that he had no idea deportation would be mandatory as a result of his offense, and had he been advised

² We take judicial notice of our prior unpublished opinion in *Mendoza*.

so, he would never had pled guilty, but he “would have sought to prove that [he was not a drug dealer] to a jury.”

The People opposed defendant’s motion, contending the motion was untimely, and that defendant was advised of the immigration consequences of his plea, as the trial court and this court confirmed in upholding the denial of his section 1016.5 motion; thus, the issue was *res judicata*.

The parties appeared before the court on December 1, 2017. The court first noted that section 1473.7 was a right created by the legislature, not by judicial formulation or common law. As such, the court believed it was limited to the words of the statute, which outlined specific grounds upon which a person could bring a motion. The court stated that it considered defendant’s motion as “one of anticipatory consequences that the defendant will receive, at some point in time . . . a notice to appear in immigration court to address his two prior convictions.” The court noted that defendant said he had not received a notice to appear in immigration court. However, the court stated that, under the words of the statute, defendant “has to . . . wait until he actually receives notice.” Defense counsel argued that “[i]t doesn’t make sense that one would have to wait . . . knowing that this is hanging over their head.” He then asserted that the legislative history showed the statute was meant to create a remedy for those facing immigration consequences. The court stated that the issue was whether section 1473.7 was the appropriate relief under the circumstances for defendant, who was not currently under a notice of removal or actual removal order in immigration court. The court emphasized the “limiting language that the legislature” put in the statute, noting that it could have just

simply said that, upon discovery of the immigration consequence, the person has an obligation to immediately seek relief before the court. The court further noted there was no ambiguity in the actual language of the statute that would necessitate looking at the legislative history. The court concluded that the statute was very clear that the motion was not the proper relief at that time, as it was premature. Thus, the court denied the motion without prejudice.

ANALYSIS

Defendant Did Not Satisfy His Burden of Proving He Was Entitled to Relief Under Section 1473.7

Defendant claims the trial court erred in denying his motion to vacate his conviction under section 1473.7. He argues that the court's interpretation of the statute was contrary to the legislative intent to allow a challenge to a conviction after the habeas period expired, rather than limit actions. He further avers that the plain language of the statute supports his position. The People concede, and we agree, that defendant did not have to wait for removal proceedings to be initiated or completed, in order to file a motion. Nonetheless, we affirm the denial of the motion to vacate.

A. Defendant's Motion Was Not Premature

Defendant contends the trial court's interpretation of section 1473.7, as limited to the circumstances in which removal proceedings have been initiated or completed, is wrong. The People concede, and we agree, that the trial court's construction was incorrect and would lead to an absurd result.

Section 1473.7 provides that a person may file a motion to vacate a conviction or sentence for one of two reasons, including that “[t]he conviction or sentence is legally invalid due to a prejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.” (§ 1473.7, subd. (a)(1).)

The trial court’s conclusion that defendant could not prosecute his motion in the absence of removal proceedings based on section 1473.7, subdivision (b), is contradicted by the plain language of section 1473.7, subdivision (a)(1). (See *People v. Morales* (2018) 25 Cal.App.5th 502, 509 (*Morales*).) Section 1473.7 “authorizes a noncitizen to pursue a motion to vacate a conviction due to an error that has compromised his or her ability to address ‘adverse immigration consequences,’ without limitation. Specifically, it authorizes a noncitizen no longer imprisoned or restrained to ‘prosecute’ such a motion because of prejudicial error that damaged his or her ‘ability to meaningfully understand, defend against, or knowingly accept *the actual or potential adverse immigration consequences*’ of a no contest plea. [Citation.] The phrase ‘actual or potential adverse immigration consequences’ is broad and encompasses circumstances other than removal, . . .” (*Morales*, at pp. 509-510.) One such example is the circumstance defendant here has asserted: his claimed inability to renew his green card.

We note that, effective January 1, 2019, section 1473.7, subdivision (b) was amended to read that a motion pursuant to section 1473.7, subdivision (a)(1) “shall be deemed timely filed at any time in which the individual filing the motion is no longer in

criminal custody.” (§ 1473.7, subd. (b)(1).) Thus, the Legislature’s intent to allow a person to file a motion to vacate a conviction, even if not in removal proceedings, is now clear.

Therefore, section 1473.7 authorizes defendants to file motions “in the face of actual and potential immigration consequences including, but not limited to, removal efforts.” (*Morales, supra*, 25 Cal.App.5th at p. 514; see also, § 1473, subd. (b)(1).) As such, the trial court should have considered the merits of defendant’s motion. (*Ibid.*)

B. Defendant Has Failed to Establish IAC

Although we agree that the trial court erred in denying defendant’s motion on procedural grounds, we nonetheless affirm its denial. We first note that, at oral argument, appellate counsel contended the trial court did not hold a hearing on the motion to vacate, as required by section 1473.7, subdivision (d), and therefore, defendant had no opportunity to present evidence. However, at the outset of the hearing on December 1, 2017, the court stated, “This is a motion pursuant to a vacated judgment pursuant to Penal Code Section 1473.7” The court also indicated it had read and reviewed the moving papers and exhibits and the People’s responding papers. In other words, defendant had the opportunity to present evidence, and he submitted a written motion, declarations, and exhibits in support of his motion. Although the court ruled on the motion procedurally, all the evidence in support of his claim was before the court. We further note that, at oral argument, counsel did not indicate she had any additional evidence to present, such as oral testimony.

In his written motion, defendant claimed his attorney was ineffective for misadvising him that a guilty plea would have no immigration consequences, and failing to seek alternative pleas that would avoid adverse immigration consequences. On appeal, defendant claims that he received IAC when his attorney failed to advise him about the immigration consequences of the plea he was entering. On the evidence presented, we conclude that defendant did not satisfy his burden of proving by a preponderance of the evidence that he was entitled to relief under section 1473.7. As such, remand of his motion to the trial court would be futile.

“Ineffective assistance of counsel that damages a defendant’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a guilty plea, if established by a preponderance of the evidence, is the type of error that entitles the defendant to relief under section 1473.7. [Citation.] To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms and that he was prejudiced by the deficient performance.” (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 75; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-688 (*Strickland*).) “[T]he burden remains [defendant’s] to prove by a preponderance of the evidence his entitlement to relief.” (*In re Resendiz* (2001) 25 Cal.4th 230, 254.)

Here, defendant has not demonstrated that his counsel’s performance was deficient. We first note that, as concluded in our prior opinion on the section 1016.5 motion, defendant was properly given the required immigration advisements on the plea

form and in court, and he said he understood them. (*People v. Mendoza, supra*, E049354.)

Furthermore, in *Padilla v. Kentucky* (2010) 559 U.S. 356 (*Padilla*), the United States Supreme Court addressed what constitutes deficient performance under the *Strickland* test, with regard to advising a defendant on the deportation consequences of pleading guilty. The Supreme Court recognized a duty to advise regarding the potential immigration consequences of guilty or no contest pleas. (*Id.* at p. 374 [“[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation.”].)

In *Chaidez v. United States* (2013) 568 U.S. 342 (*Chaidez*), the Supreme Court ruled that *Padilla* “announced a new rule” in requiring criminal defense attorneys to inform non-citizen clients of the risks of deportation arising from guilty pleas. (*Id.* at pp. 345-346, 358.) Furthermore, the Court held that *Padilla* could not be applied retroactively to cases that were final at the time the opinion in *Padilla* was issued. (*Chaidez*, at p. 344.) Thus, when defendant here pled in 1996, his plea counsel had no affirmative obligation to advise him of the certain immigration consequences of his plea. (*Ibid.*) As such, counsel’s representation of defendant did not fall below the then-contemporary reasonable objective standard of practice. (*Ibid.*)

In his reply brief, defendant argues that prior California court decisions imposed a pre-*Padilla* duty on trial counsel to inform their clients of the immigration consequences of their pleas. He relies upon *People v. Soriano* (1987) 194 Cal.App.3d 1470 (*Soriano*). In that case, the defendant submitted a declaration, stating that he informed his attorney he was an immigrant, and she told him if he pled guilty, he would serve just eight months

in county jail. He asked if he would be deported if he pled guilty, and she said he would not. He also asked whether a guilty plea would prohibit him from obtaining citizenship. The attorney responded in the negative. He subsequently again asked if he would be deported, and she assured him he would not. The defendant stated that, based on these assurances, he pled guilty. (*Id.* at p. 1478.)

The *Soriano* court determined that the trial counsel's response to the defendant's immigration questions was insufficient, since it was not based on adequate investigation of federal immigration law. Had she researched the matter, she would have known his guilty plea made him deportable. (*Soriano, supra*, 194 Cal.App.3d at p. 1482.) The court determined that this erroneous advice constituted IAC because, when asked about immigration consequences, trial counsel had an obligation to research and provide accurate information. (*Ibid.*)

Defendant's reliance on *Soriano* is misplaced. Contrary to defendant's claim, *Soriano* did not establish that defense counsel had an affirmative duty to research and advise the defendant of his immigration consequences. The *Soriano* court concluded that the trial counsel was ineffective because her response to the defendant's immigration questions was insufficient. (*Soriano, supra*, 194 Cal.App.3d at p. 1482.) This was so because counsel assured the defendant twice, *in response to his direct questions*, that he would not be deported. (*Id.* at p. 1478.) Unlike the defendant in *Soriano*, defendant here did not allege that he asked his plea counsel if his guilty plea would make him deportable. He also did not allege that his counsel assured him he would not be deported. In sum, unlike *Soriano*, there was no evidence that defendant asked his counsel about the

immigration consequences of his plea, that counsel misadvised him, or that defendant entered his guilty plea, based on his counsel's false assurances. (See *Soriano*, at p. 1478.)

Defendant also relies upon *People v. Barocio* (1989) 216 Cal.App.3d 99 (*Barocio*), in support of his position. However, *Barocio* similarly did not create an independent pre-*Padilla* duty to advise defendants of immigration consequences of their pleas. In that case, the defendant's trial attorney failed to seek a judicial recommendation against deportation (RAD). (*Id.* at p. 103.) There was no issue about counsel's advice to the defendant. Defendant here is not making a RAD claim. Thus, *Barocio* is inapposite.

Defendant further relies upon *People v. Bautista* (2004) 115 Cal.App.4th 229 (*Bautista*). In that case, an immigration attorney provided a declaration as an expert witness that an "immigration neutral" plea bargain was generally available to defendants who were similarly situated to the defendant in that case. The expert testimony established that the defense counsel's admitted failure to investigate such an "immigration neutral" disposition fell below the reasonable standard of practice. (*Id.* at pp. 238-241.) There is no indication in *Bautista* that trial counsel had a pre-*Padilla* duty to research and explain immigration consequences to their clients.

Defendant additionally claims that his trial counsel failed to negotiate an "immigration-neutral" plea bargain. However, he merely speculates, with no corroborating evidence, that his trial counsel did not attempt to secure an "immigration safe" agreement. The record does not contain a declaration from plea counsel, and defendant's current attorney did not provide a declaration in support of the section 1473.7 motion showing that plea counsel was unable or unwilling to provide a declaration. In

short, defendant has not demonstrated trial counsel's performance fell below an objective standard of reasonableness.

Even assuming that counsel's performance was somehow deficient, defendant has failed to establish prejudice. Below, he averred that, if counsel had informed him he would be deported as a consequence of his guilty plea, he would not have pled guilty, but would have opted to proceed to trial. On appeal, he asserts that, to demonstrate prejudice, he was not required to show he would have taken his case to trial, but just that "he would have sought an alternative disposition." He then asserts he would have "agreed to spend time in jail." Defendant's assertion that he would not have pled guilty was not corroborated by objective evidence. (*In re Alvernaz* (1992) 2 Cal.4th 924, 938; *In re Resendiz, supra*, 25 Cal.4th at p. 253.) A defendant's self-serving statement that, with competent advice, he would have not have pled guilty "is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked flow of easily fabricated claims." (*Alvernaz*, at p. 938.) Moreover, in contrast to his claim, the record shows defendant was willing to enter a guilty plea with immigration consequences, as he signed a form acknowledging his guilty plea may have immigration consequences.

Additionally, defendant did not adduce any objective evidence demonstrating the prosecutor might ultimately have agreed to a plea that would have allowed him to avoid adverse immigration consequences. (See *People v. Perez* (2018) 19 Cal.App.5th 818, 830.)

On the record before us, we conclude that defendant has not carried his burden of establishing that his counsel's performance was deficient. He was properly given the required immigration advisements at the time of his plea. Defendant has also failed to demonstrate he was prejudiced. He has not shown he would have not pled guilty and instead insisted on proceeding to trial. He has failed to show how he would have succeeded at trial. He has also failed to demonstrate that his counsel could have negotiated an alternative plea that would have avoided adverse immigration consequences. Ultimately, defendant has not shown by a preponderance of the evidence that he was entitled to relief under section 1473.7. (§ 1473.7, subd. (e).) As such, remand of the matter to the trial court would be futile.

DISPOSITION

The judgment is affirmed.

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McKINSTER
Acting P. J.

We concur:

MILLER
J.

SLOUGH
J.